

HOWARD COUNTY ETHICS COMMISSION

3430 Courthouse Drive
Ellicott City, Maryland 21043

September 7, 2021

OPINION NO. 2021-03

The Howard County Ethics Commission (“Commission”) has received a request from a member of the Commission. The Requestor has been nominated to serve on the Howard County Board of Appeals (the “Board of Appeals”). She has inquired prospectively to determine if there is a conflict of interest between her service on the Commission and her potential position as a member of the Board of Appeals. The Commission finds that the Requestor’s service on the Board of Appeals is not in conflict with her service on the Howard County Ethics Commission so long as she abides by the restrictions as set forth in the Conclusion of this Opinion.

I. BACKGROUND

The Requestor has served on the Commission for approximately four years. The Commission is responsible for administering the Howard County Public Ethics Law (the “Ethics Law”) with respect to all public officials, officers, and employees. *See* Howard County Code, Title 22, Subtitle 2. The Commission consists of five members appointed by the County Executive and approved by the County Council. The Commission renders advisory opinions, receives and reviews financial disclosure statements, investigates complaints, and receives and reviews lobbyist registration and activity reports.

The Requestor has been nominated to serve on the Board of Appeals. The Board of Appeals is a five-member body appointed by the County Council. It hears and decides various Howard County zoning issues such as variances, conditional uses, and non-conforming uses, and appeals of certain departmental or administrative decisions. The Requestor testified that she has publicly disclosed to the County Council that she currently serves on the Commission.

II. THE LAW

The principal provisions of the Ethics Law, which define prohibited conduct of employees are set forth in Section 22.204 of the Howard County Code (the “Code”).

Section 22.204(a)(1) of the Code provides that County officials or employees may not participate in:

- (i) Except in the exercise of an administrative or ministerial duty that does not affect the disposition or decision of the matter, any matter in which, to the knowledge of the official or employee, the official or employee or a qualified relative of the official or employee has an interest.

Section 22.204(b) of the Code, "Employment and Financial Interest Restrictions", provides that:

(1) Except as permitted by regulation of the commission when the interest is disclosed or when the employment does not create a conflict of interest or appearance of conflict, an official or employee may not:

(i) Be employed by or have a financial interest in any entity:

a. Subject to the authority of the official or employee or the County agency, board, commission with which the official or employee is affiliated; or

b. That is negotiating or has entered a contract with the agency, board, or commission with which the official or employee is affiliated; or

(ii) Hold any other employment relationship that would impair the impartiality or independence of judgment of the official or employee.

(2) The prohibitions of paragraph (1) of this subsection do not apply to:

* * * *

(ii) Subject to other provisions of law, a member of a board or commission in regard to a financial interest or employment held at the time of appointment, provided the financial interest or employment is publicly disclosed to the appointing authority and the Commission.

Section 22.204(e) of the Code, titled "*Use of Prestige of Office*", provides that:

(1) An official or employee may not intentionally use the prestige of office or public position for the private gain of that official or employee or the private gain of another.

(2) This subsection does not prohibit the performance of usual and customary constituent services by an elected official without additional compensation.

Section 22.204(g) of the Code provides that "[o]ther than in the discharge of official duties, an official or employee may not disclose or use confidential information, that the official or employee acquired by reason of the official's or employee's public position and that is not

available to the public, for the economic benefit of the official or employee or that of another person.

Further, Section 901 of the Howard County Charter provides:

Prohibitions. No officer or employee of the County, whether elected or appointed, shall in any manner whatsoever be interested in or receive any benefit of the profits or emoluments of any contract, job, work, or service for the County. No such officer or employee shall accept any service or thing of more than nominal value, directly or indirectly, from any person, firm or corporation having dealings with the County, upon more favorable terms than those granted to the public generally, nor shall he or she receive, directly or indirectly, any part of any fee, commission or other compensation paid or payable by the County, or by any person in connection with any dealings with the County, or by any person in connection with any dealings with or proceedings before any branch, office, department, board, commission or other agency of the County. No such officer or employee shall directly or indirectly be the broker or agent who procures or receives any compensation in connection with the procurement of any type of bonds for County officers, employees or persons or firms doing business with the County. No such officer or employee shall solicit or accept any compensation or gratuity in the form of money or otherwise for any act or omission in the course of his or her public work; provided, however, that the head of any department or board of the County may permit an employee to receive a reward publicly offered and paid for, for the accomplishment of a particular task.

III. ISSUE

Is it a conflict of interest for an individual to serve simultaneously on the Howard County Ethics Commission and the County Board of Appeals?

IV. DISCUSSION

A. Preliminary Discussion

In providing advice on this matter, the Commission has examined the issue exclusively as one of a potential violation of Howard County Ethics Law. It expresses no opinion as to the lawfulness of a dual appointment or the application of the doctrine of incompatibility of office.

B. Employment Prohibition

The Ethics Law precludes simultaneous employment for an official or employee with an entity that is subject to official authority of the covered employee or the authority of the Howard County agency, board or commission with which the Requestor is affiliated. To be consistent with prior Opinions of the Commission, the term “employment” is construed broadly to effectuate the purposes of the Ethics Law. (See Opinion Nos. 20-01, 07-04, 06-01, and 01-00 and State Opinions 02-02, 87-01, and 86-16).

On multiple occasions, this Commission has construed the employment provisions broadly to include affiliation that does not necessarily result in monetary compensation. Volunteer service on management or operational boards of charitable organizations or professional associations has been determined to be an employment interest. (See Opinions 20-01, 06-01 and 01-00). In this situation, both the non-compensated service on the Commission and the compensated service on the Board of Appeals constitute an employment relationship under our prior Opinions.

Requestor’s prospective appointment may be prohibited employment under the Ethics Law if the Board of Appeals is subject to the authority of the Commission. Based on the Requestor’s description of the activities of the Board of Appeals, and a review of the Commission’s duties, there may be specific areas of conflict arising in the course of the Requestor’s fulfillment of the dual roles. Specifically, the members of the Board of Appeals are subject to the County’s Ethics Law. Therefore, a complaint filed against a member of the Board of Appeals for a violation of the Ethics Law, would be subject to the authority of the Ethics Commission. Should a matter such as this occur, Requestor would have to recuse herself and follow the restrictions set forth in the Conclusion section herein.

C. Prohibited Participation

Section 22.204(a)(1) prohibits an official or employee from participating officially, except in a ministerial or administrative way, in any matter in which to his/her knowledge, he or she, or a certain relative, would have a direct interest, as distinguished from the public generally. “Matter” includes any decision, proceeding, application, submission, request for ruling or other determination, contract, claim, case or such particular matter that would involve some discrete and particularized impact on the employee or official, or which involves as a party an entity with which the official or employee or certain relatives are affiliated. (See Opinion Nos. 07-04, 06-01, 01-00, 96-03, 97-03, and 97-04.)

There is no question that in this situation a “matter” would include any issue before the Commission related to the Board of Appeals and/or its members. The Ethics Law is to be

construed liberally to effectuate its purpose and policy, including “promot[ion] [of] the continued trust and confidence of the citizens of Howard County in the impartiality and independent judgment of public officials and employees” (See Section 22.201(a)). Thus, in focusing on the substance of the Requestor’s prospective service on the Board of Appeals, the Requestor’s participation would only be barred under Section 22.204(a)(1) in those instances in which the Requestor, in her role on the Commission, participated in a matter involving the Board of Appeals or its members.

D. Disclosure of Confidential Information

Section 22.204(g) prohibits officials and employees from disclosing or using for their own gain or that of another, confidential information acquired in fulfillment of their public role. It will be necessary for the Requestor to avoid both knowingly or inadvertently disclosing confidential information. Obviously, the Requestor must not discuss matters brought to her attention as a member of the Commission to the Board of Appeals, nor could she discuss confidential Board of Appeals matters with the Commission.

The obligation to maintain confidentiality extends to less obvious situations in which a person may be able to use confidential information without necessarily disclosing it. The Requestor must take care in not inadvertently disclosing any such information in the course of serving the dual roles. If the confidential information obtained in one role is material to the participation in the other, and use of it cannot be avoided without impairing the Requestor’s required role, the Requestor must recuse herself, even if the precise matter is not one under which participation is prohibited under Section 22.204(a).

As we previously have observed, “Ethics Law plays an important role in ensuring the faith that the citizens of Howard County have in their local government . . . [T]he avoidance of actual or apparent conflicts of interests are of great import.” Op. No. 04-02, at 3.

E. Appearance of Conflict/Inconsistent Employment

Under prior decisions of the Ethics Commission, we will consider an appearance of conflict to be a use of prestige of office that is prohibited under the Ethics Law. See Section 22.204(g). See also Op. No. 07-05 and 04-02. One type of appearance of conflict is deemed “inconsistent employment.” Inconsistent employment arises when a situation raises clear and serious conflict of interest issues, but in which specific authority or contractual affiliations set forth in 22.204(b) are not present. Op. No. 07-05. Even if the connection between the Requestor’s position on the Commission and service on the Board of Appeals is not deemed an “affiliation” barring the official’s employment under 22.204(b)(1)(iii), it is, at a minimum, employment that has the potential for creating an appearance of a conflict.

The Commission typically looks to the following non-cumulative list of factors to determine whether a relationship is inconsistent employment:

- (1) How the employment was acquired;
- (2) Whether the employment was obtained on County time;
- (3) How the subject matter of the activity relates to County duties;
- (4) Whether outside activity derives from work performance or relationships that occur in connection with County responsibilities;
- (5) Whether some aspect of the County job would be impacted by the employment relationship; and
- (6) Whether the employer would feel pressured or perceived an advantage in County dealings because of its hiring of the County employee.

See., Op. No. 07-05.

In considering the factors, the Commission does not think that the Requestor's simultaneous service on the Commission and the Board of Appeals is inconsistent employment. The Requestor stated that she is interested in community relations and has a desire to serve her community. The Requestor was nominated to serve on the Board of Appeals by a Council Member and there are no facts to suggest that this nomination is in any way related to, or arose as a result of, her position on the Commission.

Further, the Commission does not generally think any potential conflict, or appearance of a conflict, rise to the level that would prohibit the Requestor's from serving on both the Commission and the Board of Appeals. As previously explained, the Commission and the Board of Appeals deal with different subject matters. However, there are possible instances where the Requestor's position on the Commission could be impacted by her position on the Board of Appeals. Therefore, the Commission has indicated various restrictions herein to negate any perception that her dual roles on the Commission and the Board of Appeals will impact or influence her service.

V. CONCLUSION

The Commission appreciates the Requestor's dedication to the community. For the reasons stated, the Requestor's potential service on the Board of Appeals is not generally in conflict with her service on the County's Ethics Commission. However, to eliminate any potential conflict or appearance of a conflict, the Requestor must comply with the following restrictions: 1) She must not participate in any matter before the Commission which deals with the Board of Appeals or any member of the Board of Appeals, and must specifically recuse herself from any meetings, discussions, or deliberations, and may not participate in any opinions issued by the Commission related to such matter; 2) She must not disclose confidential information, and if confidential information is integral to the deliberations before either the Commission or the Board of Appeals, she must recuse herself to prevent an appearance of impropriety; and 3) Should a specific matter arise and Requestor is unsure as to whether such issue may rise to a potential conflict or appearance of a conflict, the Requestor should seek additional guidance from the Commission.

HOWARD COUNTY ETHICS COMMISSION

By:



Kristen Bowen Perry, Executive Secretary
on behalf of the Howard County Ethics
Commission

Charles Fuller, Chairperson
Joanne Drielak, Vice Chairperson
Jonathan Kromm
Joseph Markwordt*
Jean Xu*

*Member Jean Xu recused herself from participating in the deliberations and decisions rendered at the August 18, 2021 Ethics Commission Meeting and member Joseph Markwordt was absent. Both Members Jean Xu and Joseph Markwordt did not participate in this Opinion.